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Supreme Court of the United States

ELWOOD STROUT, DEBORAH STROUT, JOHN EULITT, BELINDA EULITT, RICHARD ROY, AND PATRICIA ROY,
Petitioners,

v.

J. DUKE ALBANESE, in his official capacity as Commissioner of the State of Maine Department of Education,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The State of Maine provides by statute that those parents who live in a school district *without* a public high school may send their children to the private school of their choice and that the State will pay the tuition for those children at that private school up to the statutory legal tuition rate. Maine *excludes* private *religious* schools from the program, however, by statute. *See* 20-A M.R.S.A. § 2951(2). The First Circuit, in rejecting parents' challenge to that statutory exclusion, held that the Establishment Clause *requires* the discriminatory exclusion of otherwise eligible private religious schools. The questions presented are:

1. Whether the Establishment Clause of the First Amendment requires the discriminatory exclusion of an otherwise eligible private school from a state tuitioning program just because that school is religious?

2. Whether 20-A M.R.S.A. § 2951(2) violates the Free Speech and Establishment Clauses of the First Amendment because, rather than treating religion neutrally, it excludes otherwise eligible private schools from its tuitioning program based solely on the religious viewpoint presented in those schools.

3. Whether 20-A M.R.S.A. § 2951(2) violates the Equal Protection Clause of the Fourteenth Amendment because the State's refusal to pay tuition for otherwise eligible private sectarian education discriminates against parents on the basis of religion, religious beliefs, speech content and association.

4. Whether 20-A M.R.S.A. § 2951(2) violates the Free Exercise Clause of the First Amendment because it

excludes funding of otherwise eligible education solely on the basis of religion.

5. Whether 20-A M.R.S.A. § 2951(2) violates the Fourteenth Amendment and the Free Speech Clause of the First Amendment by preventing parents from using their tuition allotments to expose their children to the educational message which best reflects their morals and values.

PARTIES

All of the parties are listed in the caption on the cover. None of the parties is a corporation. *See* Rule 29.6.

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DECISIONS BELOW

The decision of the United States District Court for the District of Maine is reported at 13 F. Supp. 2d 112 (D. Me.1998). The decision for the United States Court of Appeals for the First Circuit is reported at 178 F.3d 57 (1st Cir. 1999).

JURISDICTION

The United States Court of Appeals for the First Circuit issued its decision affirming the judgment of the United States District Court on May 27, 1999. This Court has jurisdiction under Title 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

The following constitutional provisions are involved in this case: U.S. Const. amends. I and XIV § 1. The Maine state statutory provision (set forth in the Appendix to the Petition) is: 20-A M.R.S.A. § 2951(2).

STATEMENT OF THE CASE

Petitioners are three sets of parents who reside in Minot, Maine who have challenged the constitutionality of a state statute, 20-A M.R.S.A. § 2951(2), which precludes parents who send their children to sectarian schools from participating in the State's private school tuitioning program. By statute, towns which do not operate secondary schools must pay up to the legal tuition rate to the public or private high schools selected by parents for their children. 20-A M.R.S.A. §5304(4). Because the Town of Minot does not have a high school, Petitioners chose to send their daughters to St. Dominic Regional High School ("St. Dominic's"), a sectarian secondary school in nearby Lewiston, Maine. Because St. Dominic's is

a religious school and therefore not a "non-sectarian" school as specified by the statute, the State of Maine has denied Petitioners the right to participate in the tuitioning program.[1]

Petitioners do not contend that the State of Maine has an affirmative obligation to fund private education – sectarian or nonsectarian. They do argue, however, that once Maine decides to fund private education, as it does here, it must fund sectarian and nonsectarian education equally and in a manner which is not hostile towards religion.

A. Statement of Material Facts

Petitioners are three sets of parents who live in a school district in Maine which does not have a public high school. Petitioners have challenged the constitutionality of a state statute, 20-A M.R.S.A. § 2951(2), which precludes parents who send their children to sectarian schools from participating in the State's tuitioning program. By statute, all school boards in Maine must provide education for residents through the twelfth grade. 20-A M.R.S.A. § 1001(8). The Town of Minot, by the Minot School Committee, does not operate a secondary school.

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[1]A challenge to 20-A M.R.S.A. § 2951(2), was also brought in Maine state court. *Bagley v. Raymond School Dept.*, 728 A.2d 127 (Me. 1999), *petition for certiorari filed*, – U.S.L.W. – (Jul. 22, 1999) (No. 99-163). The Maine Supreme Court's opinion paralleled the First Circuit's opinion in *Strout*, holding that the discrimination against religion and the religious viewpoint is required by the Establishment Clause.

In addition, in a recent decision, the Vermont Supreme Court held that pursuant to a very specific provision in the Vermont Constitution, no public funds could be used to finance sectarian education. *Chittenden Town School Dist. v. Vermont Dept. of Educ.*, – A.2d – , 1999 WL 378244 (Vt., June 11, 1999). The court, however, concluded that under this Court's Establishment Clause jurisprudence, it might reach a contrary result.

In order to fulfill its obligation under § 1001(8), the Committee pays tuition for high school aged residents to attend "a private school approved for tuition purposes, a public school in an adjoining unit which accepts tuition students, or a school approved for tuition purposes in another state or country" pursuant to 20-A M.R.S.A. § 5204(4). Pursuant to § 5204(4), the Committee is obligated to pay up to the legal tuition rate, established by 20-A M.R.S.A. § 5606, to the school which the parents select. Parents are responsible to pay that portion which exceeds the established rate. For the 1996-97 school year, the established rate was $4,900.00.

At the core of this petition is 20-A M.R.S.A. § 2951(2), which states in pertinent part that "a private secondary school may be approved for the receipt of public funds for tuition purposes only if . . . [i]t is a nonsectarian school in accordance with the First Amendment of the United States Constitution." The only other requirements of the statute are that the school meet the basic approval of § 2901, namely that the school be incorporated, comply with the reporting and auditing requirements, and participate in Maine's academic assessment program.

St. Dominic Regional High School (St. Dominic's) is a private, sectarian Catholic school located in Lewiston, Maine. Tuition for St. Dominic's for the 1996-97 school year was approximately $3,850.00. St. Dominic's is approved by the State of Maine Department of Education pursuant to 20-A M.R.S.A. § 2901 and is incorporated under the laws of the State of Maine. St. Dominic's exceeds the curriculum requirements mandated by law. In short, St. Dominic's qualified as an eligible school under Maine's tuitioning program in all respects but one: because it is not "non-sectarian" as required by § 2951(2), it is not "approved for

tuition purposes" thereunder. Accordingly, parents who send their children to St. Dominic's are ineligible to receive tuition reimbursement under the tuitioning scheme.

Petitioners Elwood Strout and Deborah Strout requested reimbursement from School Union 29 to pay tuition for their daughter, Shea, to attend St. Dominic's for the 1996-97 school year. School Union 29, by its Superintendent Robert E. Wall, denied their request, by letter dated October 10, 1996, stating, "[t]he law is clear that we are unable to pay tuition for St. Dom's," referencing a letter from the Department of Education Deputy Commissioner Poulin which stated that to do so would be "unconstitutional and illegal." *Plaintiffs' Amended Complaint, Exhibit 1.* The Strouts additionally sought reimbursement from the Department of Education by letter dated July 15, 1996. The Department of Education, by its Commissioner, Defendant-Appellee J. Duke Albanese, by letter dated August 20, 1996, denied their request. *Plaintiffs' Amended Complaint, Exhibit 2.* Again, on September 23, 1996, the Strouts wrote to the Department of Education and Defendant-Appellee Albanese, seeking reimbursement, and again, by letter dated November 22, 1996, their request was denied. *Plaintiffs' Amended Complaint, Exhibit 3.* The letter cited 20-A M.R.S.A. § 2951 as the basis for the denial of the request. Likewise, the Strouts' request for tuition reimbursement for their daughter to attend St. Dominic's for the 1997-98 year was denied.

Petitioners John and Belinda Eulitt were orally informed by Superintendent Wall that tuition for their daughter, Alena, to attend St. Dominic's for the 1996-97 school year would not be reimbursed. In light of this and with knowledge of the Strouts' experience, they believed that a formal request would be futile.

Similarly, Petitioners Richard and Patricia Roy attended an open parents meeting in the Fall of 1997 at which time they were informed that tuition would not be reimbursed if they chose to send their daughter, Jennifer, to St. Dominic's for the 1997-98 school year, due to the religious nature of the school.

If the Petitioners' children attended an approved public or private *non-sectarian* school, outside the State of Maine or even outside the United States, the State of Maine would subsidize their education. But Maine singles out for discriminatory exclusion from its program those parents who choose to send their children to private *religious* school. This discriminatory practice manifests Maine's hostility toward the religion. Petitioners seek to end this discrimination and to obtain funding on an equal basis with other Maine parents who send their children to non-sectarian private schools.

B. Statement on Preservation Below of Federal Questions

The federal questions presented by the Petitioners have been the central focus of this dispute between the parties and the principal grounds of the decisions below. Both the United States District Court for the District of Maine and the United States Court of Appeals for the First Circuit rejected Petitioners' arguments that Maine's discrimination against the religious viewpoint in public school violates: (1) the Establishment Clause of the First Amendment; (2) the Equal Protection Clause of the Fourteenth Amendment; (3) the Free Exercise Clause of the First Amendment; (4) the Due Process Clause of the Fourteenth Amendment; and (5) the Free Speech Clause of the First Amendment. Both lower courts held that the Establishment Clause of the First Amendment *required* Maine's discrimination against religion.

REASONS FOR GRANTING THE WRIT

The central issue in this case is one of great importance: whether the Establishment Clause of the First Amendment *requires* discrimination against the religious point of view in the provision of tuition assistance to parents of children attending private schools. This Court's Establishment Clause jurisprudence and the highest courts of three states have concluded that the Establishment Clause is not offended by a neutral program of state assistance which allows parents to decide where the aid will be spent. In such a program there can be no argument that the state is endorsing religion or one religion over another. The First Circuit, by contrast, reached a decision in square conflict with these other cases.

The Petitioners are parents of Maine children who seek review by this Court of the First Circuit's decision which confused *indirect aid* (based on parental choice as to where to money will be spent) with *direct aid* (based on a state's choice as to where money will be spent) and thereby upheld, as supposedly constitutionally required, a statutory program of discrimination against religious viewpoint. The decision below directly conflicts with the decisions by this Court forbidding such discrimination, particularly when, as here, the discrimination is justified by misplaced fear of an Establishment Clause violation.

This Petition presents a direct conflict between the First Circuit and three state supreme courts. The Petition also presents an important and substantial issues which necessitate review. This Court's should grant review.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

The decision below directly contradicts this Court's precedents involving the Establishment Clause in three respects. First, the court below misinterpreted this Court's directives regarding *direct* and *indirect* funding of religious education. Second, the decision below conflicts with this Court's numerous decisions protecting religious speech and the religious viewpoint from discrimination by the State. Third, the decision below fails to consider, and therefore contradicts, this Courts's post-*Nyquist* jurisprudence.

A. The Decision Below Misapplies the Concepts of *Direct* vs. *Indirect* Funding and Thus Conflicts With This Court's Decisions.

The First Circuit's opinion held that any Free Speech, Equal Protection or Free Exercise rights of the Petitioners which are violated by Maine's discriminatory funding of private education are trumped by the compelling state interest of the State of Maine to uphold the Establishment Clause of the United States Constitution. *Strout* v. *Albanese*, 178 F.3d 57, 64 n.12 (1st Cir. 1999). The court based its ruling upon the premise that this Court's decisions purportedly categorically forbid, under the Establishment Clause, any program in which funds are *directly provided* to sectarian institutions. The First Circuit misinterpreted *directly provided* to include any aid paid by the State to the sectarian institution, regardless of how and by whom the determination is made to direct the aid. According to the First Circuit, it makes no difference that the funds are paid to the sectarian school *at the direction of the parent* rather than *at the direction of the State*. The fact that the

private choices of parents has directed the State to pay the institution is of no consequence to the court below.

This Court, however, in *Agostini v. Felton,* 521 U.S. 203, 225 (1997), specifically rejected the notion "that all government aid that directly aids the educational function of religious schools is invalid." To the contrary, this Court has held that financial aid appropriated by the State can be constitutional if (1) it is neutral on its face regarding religion and (2) any aid to religious schools results from the private decisions of individuals. *Witters* v. *Washington Dept. of Services for the Blind,* 474 U.S. 481, 490-92 (1986) (Powell, J., concurring). In *Witters,* this Court held that the Establishment Clause did not constitute a bar to the issuance of vocational tuition to a blind person who wished to use the grant to attend a Christian college and obtain a religious education. The program was held valid because the money was made available *neutrally,* that is, without regard to whether it was going to be used for a sectarian or nonsectarian, public or non-public institution. In *Agostini,* the Court noted that it made no difference whether tuition money went to religious institutions, so long as that outcome came about "only as a result of the genuinely independent and private choices of individuals." *Agostini,* 521 U.S. at 226 (internal quotation omitted).

Contrary to the First Circuit's opinion, aid is not designated *direct* or *indirect* based on where the aid ends up but rather on who makes the decision as to where the aid is to be spent. If the parents make the choice then the aid to the sectarian institution is *indirect* and not *direct.* The First Circuit's opinion below, therefore, rests on a fundamental misunderstanding of this Court's distinction between *direct* (government-directed) and *indirect* (parent-directed) aid. Petitioners here are making the choice and not the State of

Maine; state dollars go to St. Dominic's at the direction of the parents and not at the direction of the State of Maine. The funding is, thus, *indirect*.[2]

The Establishment Clause forbids the endorsement of religion by the State, not by private actors. Hence, this Court has emphasized the importance of personal private choice in this area of the law. In *Mueller v. Allen*, 463 U.S. 388 (1983), this Court disposed of the argument that all state aid which ends up in sectarian schools violates the Establishment Clause by noting that while state aid given to parents for use at a sectarian school has the same economic effect as state funds given directly to the sectarian institution, the parents' choice renders the aid indirect and, thus, constitutionally acceptable. As this Court stated in *Mueller*:

> Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no "imprimatur of state approval" . . . can be deemed to have been conferred on any particular religion, or on religion generally.

Id. at 399 (quoting *Widmar v. Vincent,* 545 U.S. 263, 274 (1981)).

Similarly, in *Zobrest v. Catalina Hills School District,* 509 U.S. 1 (1993), this Court upheld the provision of a language interpreter for a deaf student in a sectarian school. The Court

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[2]In *Columbia Union College v. Clark,* 159 F.3d 151, 159 (4th Cir. 1998), *cert. denied,* 119 S. Ct. 2357 (1999), the Fourth Circuit identified the constitutional fault with an aid program as arising where "[t]he state aid at issue . . . reaches a religious school solely as a result of a decision 'made by the state' not the student." (Citing *Witters*, 474 U.S. at 488.)

upheld the *Zobrest* program because the payment for the interpreter was the result of the private decisions of individual parents. Moreover, because the program created "no financial incentive for parents to choose a sectarian school, an interpreter's presence there '[could] not be attributed to state decision making.' " *Id.* at 10.

B. The Decision Below Conflicts with this Court's Numerous Decisions Protecting Religious Speech and the Religious Viewpoint against Government Discrimination.

In a recent line of cases, this Court has expanded and clarified the protection for the rights of religious speech and the religious viewpoint. *Mueller* v. *Allen*, 463 U.S. 388 (1983) (state income tax deduction for educational expenses including those incurred at sectarian schools); *Witters* v. *Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986) (state financial assistance to blind student attending private Christian college); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U. S. 1 (1993) (sign-language interpreter provided for deaf student in sectarian high school); *Rosenberger* v. *Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995) (state university funds used to pay printing costs of student newspaper espousing religious viewpoint); *Agostini* v. *Felton*, 521 U.S. 203 (1997) (public school teachers proving remedial education to disadvantaged children in parochial schools). *See also* Viteritti, *Joseph P. Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*, 21 Harv. J. L. & Pub. Pol'y 657, 709-716 (1998).

Also, in its public forum analysis this Court has broken down the wall of "segregation" of religion and religious speech. *Board of Educ. of Westside Comm. Schools (Dist. 66) v.*

Mergens, 496 U.S. 226 (1990); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Widmar* v. *Vincent*, 454 U.S. 263 (1981). In each of these cases, this Court rejected a proffered Establishment Clause excuse for discriminating against religion or the religious viewpoint.

In *Agostini* the Court relied *inter alia* on its decision in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), a public forum case which required a state university facility to be open equally to religious and non-religious groups. By referencing *Widmar*, the *Agostini* Court applied equal access analysis to the issue of public aid to sectarian schools, holding that the neutrality of an aid program is "an important index of secular effect." *Agostini*, 521 U.S. at 231 (citing *Widmar*, 454 U.S. at 274). The aid program at issue in *Agostini* was upheld because it did not "give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services." *Id.* at 232.

In *Widmar* this Court forbade, as a violation of the First Amendment, discrimination against religious speech at a public university. The Court ruled that religious speech was entitled to no less protection than other kinds of speech and that once a forum was opened to expression, the Establishment Clause provided no defense for discrimination against religious speech. *Widmar* was followed by *Mergens* and then *Rosenberger*, in which the Court again held that the Establishment Clause provided no defense to a public university seeking to discriminate against a publication with a religious point of view. Much like the State of Maine, the University of Virginia in *Rosenberger* and University of Missouri at Kansas City in *Widmar* defended their exclusion of religious groups from participation in otherwise available

university programs, simply because a religious group has a religious point of view. This Court held that fear of an Establishment Clause violation does not justify discrimination against a religious point of view. It is important to note that the First Circuit in the case *sub judice* conceded that the constitutional rights of Petitioners have been violated but nevertheless held that the violation of these rights was justified – indeed required – under the Establishment Clause. *Strout*, 178 F.3d at 64 n.12.

The *Widmar/Mergens/Rosenberger/Agostini* line of cases dispelled the too-common assumption that religion and those asserting a religious point of view could and should be discriminatorily excluded from government and educational assistance programs. As this Court re-stated in *Mergens* "[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Mergens*, 496 U.S. at 248 (quoting *McDaniel v. Paty,* 435 U.S. 618, 641 (1978)) (Brennan, J., concurring in judgment).

C. The Decision Below Fails to Consider, and Flatly Contradicts, this Court's Post-*Nyquist* Jurisprudence.

In *Agostini*, the Supreme Court discussed the development of Establishment Clause jurisprudence and the faulty assumption upon which this anti-religious discrimination had rested, concluding that: "[o]ur more recent cases have undermined the assumptions upon which [past decisions] relied." 521 U.S. at 222. Morever, "[w]e therefore conclude that our Establishment Clause law has 'significant[ly]

chang[ed]' since we decided [those cases]." *Id.* at 237 (citation omitted).

The First Circuit's decision in *Strout* is inconsistent with this Court's more recent Establishment Clause jurisprudence, relying as it does on *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U.S. 756 (1973), and other decisions predicated upon an incomplete, inaccurate, and outdated Establishment Clause jurisprudence. The First Circuit held that the Establishment Clause requires discrimination in funding between private sectarian and private non-sectarian schools. This holding contradicts the Supreme Court's holdings in *Agostini*, *Mergens, Zobrest*, *Witters*, and *Mueller*. The denial of Petitioners' constitutional rights cannot be justified by a fear of Establishment Clause violation because this Court's decisions make it clear that there is no Establishment Clause violation when a program treats all students the same whether they attend sectarian or non-sectarian private schools and when the expenditure of public funds is made on the basis of parental choices rather than state choices.

Commenting on the development in Establishment Clause jurisprudence, this Court, in *Rosenberger* v. *Rector of the University of Virginia,* 515 U.S. 819 (1995), noted the importance of neutrality: "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Id.* at 839.

II. THE DECISION BELOW CONFLICTS WITH THE RECENT DECISIONS OF THE SUPREME COURTS OF OHIO, ARIZONA AND WISCONSIN.

The Wisconsin, Arizona and Ohio Supreme Courts have held that State educational funding which ends up in sectarian institutions does not in and of itself create an Establishment Clause violation. These courts ruled that the Establishment Clause was not violated so long as the benefit to the sectarian institution was the result of a genuinely neutral program which preserved independent parental choice as to how the money is to be spent. These courts held that when the programs are neutral there can be no perceived endorsement of religion by the state. Each noted that parental choice ensures that parents, and not the state, will be making the decisions how the money will be spent. These cases also deny the applicability of *Nyquist* in light of the more recent developments in Supreme Court Establishment Clause jurisprudence.

The Wisconsin Supreme Court in *Jackson* v. *Benson*, 218 Wis. 2d 835, 578 N.W.2d 602, (1998), *cert. denied,* 119 S. Ct. 466 (1998), applied this Court's *Lemon* analysis, *see Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), to an Establishment Clause challenge to the Milwaukee Voucher Program. The voucher program provided private school assistance to low income students seeking to attend sectarian or non-sectarian schools. The court found that the program did not violate the Establishment Clause because it was neutral and provided for parental choice. Citing this Court's decision in *Everson v. Board of Education,* 330 U.S. 1 (1947), the Wisconsin Supreme Court found that the benefits of the Milwaukee Program extended to all citizens without regard to their religious beliefs and that the aid to the sectarian schools was indirect because it flowed to the sectarian institutions "only as

a result of genuinely independent and private choices of aid recipients." *Jackson,* 578 N.W.2d at 618 (citing *Witters*, 474 U.S. at 487). The *Jackson* court held that the Supreme Court Establishment Clause jurisprudence culminating in *Agostini*

> established the general principle that state educational assistance programs do not have the primary effect of advancing religion if those programs provide public aid to both sectarian and non-sectarian institutions (1) on the basis of neutral, secular criteria that neither favor nor disfavor religion; and (2) only as a result of numerous private choices of the individual parents of school age children.

Jackson, 578 N.W.2d at 617. The conflict between this decision and the First Circuit's understanding of this Court's Establishment Clause jurisprudence could not be more direct.

Likewise, in *Simmons-Harris* v. *Goff,* 86 Ohio St. 3d 1, 711 N.E.2d 203 (1999), the Ohio Supreme Court upheld an Ohio voucher program in the face of an Establishment Clause challenge.[3] Applying the *Lemon* test, the Court found that the program had a secular legislative purpose, that its primary effect neither advanced nor inhibited religion, and that it did not excessively entangle government with religion.

The *Goff* court ruled that the fact that beneficiaries of the School Voucher Plan attended sectarian schools did not render the program unconstitutional if the scholarships were "allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and [are] made available to both religious and

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[3]The statute was, however, struck down by the court for violating the Uniformity Clause of Section 26 Article II of the Ohio Constitution.

secular beneficiaries on a nondiscriminatory basis." 711 N.E.2d at 210 (citing *Agostini*, 521 U.S. at 231). Relying on this Court's decisions in *Zobrest*, *Witters*, and *Mueller*, the *Goff* court held that whatever link between government and religion is created by the School Voucher Program

> is indirect, depending only on the 'genuinely independent and private choices' of individual parents who act for themselves and their children, not for the government.

711 N.E.2d at 209 (citing *Witters*, 474 U.S. at 487).

The decision in *Goff* demonstrated the irrelevance of the hyper-technical arguments over the literal payee on the education aid check. As *Goff* notes, where the program is neutral and the choices are made by students and parents, the real beneficiaries of this program are students.[4]

The Supreme Court has viewed benefits flowing to sectarian schools from genuinely neutral programs, based upon choices made by parents, constitute permissible *indirect* assistance to sectarian schools. *See* Section I. So, from a constitutional viewpoint, the only real Establishment Clause issue is: who is making the choice to spend the money on a particular school. The issue is not whether the sectarian school receives a benefit. The fact that a sectarian school benefits from a private parental choice to send a student there is beside the point. Also beside

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[4]The Eighth Circuit Court of Appeals held that a school district was prohibited from denying special education services to a student merely because the student attended a religious school. *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998).

the point is the hyper-technical detail whether the government check is made payable to the parent and endorsed over to the private school, or made payable to the private school because of the parent's choice of that particular school. The key issue is whether *parental* choice or a *governmental* choice determines where any benefit goes. Indeed, if the Establishment Clause forbade any public program which offers assistance to sectarian schools, then other government programs which provide assistance to students attending sectarian schools, such as the GI bill, would have already been ruled unconstitutional.

Finally, the Arizona Supreme Court, in *Kotterman* v. *Killian,* 193 Ariz. 273, 972 P.2d 606 (1999), *petition for cert. filed,* 67 U.S.L.W. 3671 (Apr. 26, 1999) (Nos. 98-1716, 1718), also embraced the principle of neutrality, relying on *Agostini, Rosenberger, Zobrest, Witters* and *Mueller.* The challenged Arizona program allowed a state tax credit of up to $500.00 for those who donate to school tuition organizations which grant tuition to sectarian and non-sectarian schools. The *Kotterman* court upheld the program in the face of an Establishment Clause challenge. The court analyzed this program under the three prong test in *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), and found that the program satisfied the *Lemon* test. The court found that the program had a secular purpose, citing the Supreme Court's language in *Mueller*:

> A state's decision to defray the cost of educational expenses incurred by parents – regardless of the type of schools their children attend – evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and the state's efforts to

> assist parents in meeting the rising costs of educational expenses plainly serves the secular purpose of ensuring that the state's citizenry is well-educated.

Kotterman, 972 P.2d at 611 (citing *Mueller*, 463 U.S. at 395).

Kotterman distinguished *Nyquist,* as this Court did in *Mueller*, by describing the tuition assistance program there as "thinly disguised 'tax benefits,'" actually amounting to tuition grants, to the parents of the children attending private schools." *Id.* at 612 (citing *Mueller,* 463 U.S. at 394). Importantly, Petitioners in this case are not arguing that the state of Maine has an obligation to fund private education equally with public education, so *Nyquist* is inapposite. Petitioners here argue, however, that once a state begins to fund private education it must do so equally among all points of view.

Like the Ohio Supreme Court in the *Goff* case and the Wisconsin Supreme Court in *Jackson*, the Arizona Supreme Court in *Kotterman* emphasized the means by which the private funds reach sectarian schools and the importance of "numerous, private choices" in contrast to direct state financial aid. *See Mueller,* 463 U.S. 388, 399 (1983). The Arizona court correctly understood the distinction between direct and indirect assistance: "[w]here assistance to religious institutions is indirect and attenuated, *i.e., private individuals choose where the funds will go,* the Justices have generally been reluctant to find a constitutional impediment." *Kotterman,* 972 P.2d at 613.

The First Circuit, in square conflict with *Jackson, Goff,* and *Kotterman,* disregarded the key feature of parental choice and instead held it would be unconstitutional to have a neutral

assistance program simply because the aid was made literally payable to the school the parents selected. The First Circuit erroneously tied its decision to an excessively formal view of direct versus indirect benefits, a view this Court has long since rejected.

Conclusion

For all of the above reasons, this Court should grant *certiorari*.

Respectfully submitted,

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APPENDIX

APPENDIX A

Elwood STROUT, et al., Plaintiffs, Appellants,
v.
J. Duke ALBANESE, In His Official Capacity as Commissioner, Maine Department of Education, etc., et al., Defendants, Appellees.

No. 98-1986.

United States Court of Appeals,
First Circuit.

Heard Feb. 4, 1999, Decided May 27, 1999.

Affirmed.

Vincent P. McCarthy, with whom Ann-Louise Lohr, The American Center for Law and Justice, Northeast, Brian W. Raum, American Center for Law and Justice, New York, Stephen C. Whiting, The Whiting Law Firm, P.A., Jay A. Sekulow and American Center for Law and Justice, Inc. were on brief, for appellants.

Peter J. Brann, State Solicitor, with whom Andrew Ketterer, Attorney General, and Paul Stern, Deputy Attorney General, were on brief, for appellee Commissioner, Maine Department of Education.

A. Van C. Lanckton, Craig & MacCauley, PC and Marc D. Stern on brief for American Jewish Congress, amicus curiae.

Robert H. Chanin, John M. West, Alice O'Brien, Bredhoff

& Kaiser, P.L.L.C., Donald F. Fontaine, Fontaine & Beal, P.A., Steven K. Green, Ayesha N. Khan, Elliot M. Mincberg, Judith E. Schaeffer, Barbara G. Shaw, Marcus, Grygiel & Clegg, PA, Jeffrey A. Thaler, Bernstein, Shur, Sawyer & Nelson, Elizabeth J. Coleman, Steven M. Freeman, Lauren A. Levin and David Rosenberg on brief for Maine Education Association, National Education Association, Americans United for Separation of Church and State, People for the American Way Foundation, Maine Civil Liberties Union, and Anti-Defamation League of B'nai B'rith, amici curiae.

Before Torruella, Chief Judge, Campbell, Senior Circuit Judge, and Stahl, Circuit Judge.

TORRUELLA, Chief Judge.

As we embark upon resolution of the thorny questions presented by this appeal, it is appropriate that we keep in mind that "[c]onstitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics." Tilton v. Richardson, 403 U.S. 672, 678, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971). The controversy before us patently reflects this truth.

The issues raised require us to consider the sometime competing values found in the Religion Clauses of the First Amendment of the Constitution [FN1]-- otherwise described as "the internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause." Id. at 677, 91 S.Ct. 2091. "[B]oth are cast in absolute terms, ... either of which, if expanded to a logical extreme, would tend to clash with the other." Walz v. Tax Commission, 397 U.S. 664, 668-69, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970).

FN1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." U.S. Const. amend. I.

BACKGROUND

Maine has enacted a statute providing schooling for those students who live in communities that do not have public education facilities because of insufficient student density. [FN2] For these students, the state will pay grants directly to qualified private educational institutions to subsidize their schooling, provided the institutions are "non-sectarian" in nature. [FN3]

FN2. See Me.Rev.Stat. Ann. tit. 20, § 5204(4).

FN3. See Me.Rev.Stat. Ann. tit 20-A, § 2951(2).

Plaintiff-Appellants are the parents of students who are otherwise qualified to receive the benefits of this state-created subsidy, except that they have chosen to send their children to private sectarian schools. After Maine refused to fund their chosen sectarian institution, St. Dominic's Regional High School in Lewiston, Maine, the parents brought an action in the United States District Court for the District of Maine alleging numerous violations of their rights under: (1) the Establishment Clause; (2) the Equal Protection Clause; (3) the Free Exercise Clause; (4) the Due Process Clause of the Fourteenth Amendment; and (5) the Speech Clause of the First Amendment. [FN4]

FN4. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal

> protection of the laws." U.S. Const. amend. XIV, § 1. The Establishment Clause, Free Exercise Clause, and the Free Speech Clause have been found to be applicable to the states through the Fourteenth Amendment. See Everson v. Board of Educ., 330 U.S. 1, 8, 67 S.Ct. 504, 91 L.Ed. 711 (1947) (citing Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 108, 63 S.Ct. 870, 87 L.Ed. 1292 (1943)).

The district court framed the issue before it as "whether Maine is constitutionally required to extend subsidies to sectarian schools." It viewed plaintiff-appellants' arguments "in terms of free exercise claims, establishment clause claims, equal protection claims and substantive due process claims," but found "it unnecessary to address [them] separately or to analyze the various tests that have been enumerated," because "[t]he same answer is obvious for all." Concluding that although plaintiff-appellants were free to send their children to sectarian schools, "they do not have a right to require taxpayers to subsidize that choice," the district court rejected their claims and granted summary judgment in favor of defendant-appellees. This appeal followed.

Below we address seriatim each of the bases on which the plaintiffs' claim an entitlement to relief.

DISCUSSION

I. Establishment Clause

First, plaintiff-appellants argue that the statute, § 2591(2), violates the Establishment Clause because, rather than treating religion neutrally, it demonstrates a hostility toward religion by excluding otherwise eligible sectarian schools from the tuition program based solely on the religious

viewpoint presented by these schools.

Although "this Nation's history has not been one of entirely sanitized separation between Church and State," Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1993), and while various forms of aid to religious institutions are permissible and have been approved by the somewhat inscrutable guidelines of the Supreme Court, [FN5] there is no binding authority for the proposition that the direct payment of tuition by the state to a private sectarian school is constitutionally permissible. See id. at 780, 93 S.Ct. 2955.

> FN5. See Agostini v. Felton, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (upholding a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis, taught on the premises of sectarian schools by government employees, thus reversing in part, Aguilar v. Felton, 473 U.S. 402, 105 S.Ct. 3232, 87 L.Ed.2d 290 (1985) and School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 105 S.Ct. 3248, 87 L.Ed.2d 267 (1985)); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (holding that a state university program, whereby payment is made from mandatory student fees to outside contractors for the printing cost of a variety of student organizations, does not contravene the Establishment Clause); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993) (holding that providing a deaf student with a government-paid sign language interpreter who accompanies the student to classes in a sectarian school does not violate the Establishment

Clause); Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986) (holding that the extension of aid to a blind student under a state vocational program by making direct payments to a student enrolled in a sectarian college does not violate the Establishment Clause); Mueller v. Allen, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983) (holding that a state law allowing taxpayer-parents to deduct certain educational expenses in computing their state income tax does not violate the Establishment Clause even with regard to children attending sectarian schools); Wolman v. Walter, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714 (1977) (holding that a state law: [1] authorizing the purchase and loan of secular text books to students in sectarian schools at their request or that of their parents; [2] supplying standardized test forms on secular subjects to sectarian schools that are thereafter scored by commercial services paid by the state; [3] providing speech, hearing, and psychological diagnostic services to students at sectarian schools at public expense by public employees; [4] authorizing the expenditure of public funds for therapeutic, guidance, and remedial services to students, including those in sectarian schools, the services to be provided at public locations, does not contravene the Establishment Clause, but provisions in that statute: [a] authorizing the expenditure of public funds for the purchase and loan to students or their parents of instructional material and equipment "incapable of diversion to religious use"--such as projectors, tape recorders, record players, maps and globes, science kits and weather forecasting charts--to be stored on sectarian school premises and

administered therein by publicly hired personnel; and [b] providing field trip transportation and services to non-public school students, are invalid with regard to sectarian schools); Tilton v. Richardson, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971) (holding that a federal statute which provides grants to colleges and universities for the construction of buildings and facilities used exclusively for secular educational purposes may be applied to sectarian institutions without violating the Establishment Clause, but allowing the Federal government 20-year oversight authority over the use of any facility constructed with such funds to ensure its nonsectarian use, violates the Religion Clauses); Board of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968) (holding that the lending by a state to parochial school students of non-sectarian textbooks available to all students is permissible under the Establishment Clause); Everson v. Board of Educ., 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947) (holding that a state may reimburse the parents of parochial school students for the cost of their transportation to and from the schools provided it is part of a "general program" whereby busing of students includes nonsectarian school students). But see Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994) (holding that the creation of a school district which de facto is defined by common religious affiliation, and delegation of the state's discretionary authority over public schools to said group, is a violation of the Establishment Clause); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985) (holding that

certain public programs that provided services on sectarian school premises violated the Establishment Clause); Meek v. Pittenger, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975) (holding that a state statute allowing the direct loan of: [1] instructional material, including periodicals, photographs, maps, charts, recordings, and films; and [2] equipment, including projectors, recorders, and laboratory paraphernalia, to sectarian schools violated the Establishment Clause); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973) (holding that direct payments by a state to sectarian schools pursuant to a statute providing grants for maintenance and repair of school facilities as well as certain income tax deductions for tuition expenses at sectarian schools violate the Establishment Clause); Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) (holding that the reimbursement by a state to sectarian schools of the cost of teachers' salaries, textbooks, or other instructional materials violates the Establishment Clause).

A statement to the effect that "Congress shall make no law respecting the establishment of religion," U.S. Const. amend. I, is hardly equivocal language. The fact that it is the first of the several constitutional do's and don'ts contained in the Bill of Rights may not have been coincidental. Separation of church and state constituted a paramount principle and goal in the minds of some of the most influential of the Framers both by dint of historical experience, [FN6] and personal conviction. [FN7]

FN6. T. Curry, The First Freedoms 217 (1986)

(stating that at the time of the framing of the Bill of Rights: "The belief that government assistance to religion ... violated religious liberty had a long history.").

FN7. See Thomas Jefferson, A Bill for Establishing Religious Freedom, reprinted in 5 The Founder's Constitution 84 (P. Kurland & R. Lerner eds., 1987); James Madison, Memorial and Remonstrance Against Religious Assessments, cited in Everson, 330 U.S. at 63-72, 67 S.Ct. 504.

We highlight the proposition that in some cases in which state infringement on the free exercise of religion takes place, otherwise prohibited conduct may be permitted if the state establishes an overriding societal interest. Upholding the Establishment Clause, which is aimed at avoiding an entangled church and state, is such a paramount interest. In the long run, an entanglement of the two has been shown by history to be oppressive of religious freedom. See Nyquist, 413 U.S. at 760, 93 S.Ct. 2955; Engel v. Vitale, 370 U.S. 421, 431, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962) (such a union may tend "to destroy government and to degrade religion."); Everson, 330 U.S. at 12, 67 S.Ct. 504 ("cruel persecutions were the inevitable result of government established religions."). The present case, in which direct subsidies would be paid by the state to a sectarian primary and secondary school, is such an imbroglio.

In Nyquist, New York created a two-part program to help defray the costs of educating low-income children who chose to attend private religious schools. See 413 U.S. at 762-67, 93 S.Ct. 2955. The first part of the program provided for direct money grants from the State to "qualifying" nonpublic

schools to be used for the "maintenance and repair of ... school facilities and equipment to ensure the health, welfare and safety of enrolled pupils." Id. at 762, 93 S.Ct. 2955. The second part involved tuition reimbursement grants which the state gave to low-income parents of private schoolchildren (including those who attended religious schools) as partial reimbursement for their children's tuition, and limited state income tax relief for parents who did not qualify for the tuition reimbursement. See id. at 764, 93 S.Ct. 2955. The Court concluded that all three programs were invalid under the Establishment Clause because they had the primary effect of advancing religion. See id. at 774-94, 93 S.Ct. 2955. With reference to the reimbursement portion of the law, the Court stated:

> There can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools, since they would suffer from the same deficiency that renders invalid the grants for maintenance and repairs. In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid.

Id. at 780, 91 S.Ct. 2091 (emphasis added).

This dichotomy between direct and indirect aid is a recurring theme throughout Establishment Clause litigation. Although not all cases fit neatly within this formula, and this somewhat tenuous distinction has been the subject of considerable criticism by academia, [FN8] it is the closest thing that we have to a workable bright line rule, or that

perhaps is possible.

> FN8. Mark J. Beutler, Public Funding of Sectarian Education: Establishment and Free Exercise Clause Implications, 2 Geo. Mason Independent L.Rev. 7, 40-46 (1993); Al McConnell, Note, Abolishing Separate but (Un)Equal Status for Religious Universities, 77 Va. L.Rev. 1231, 1248 (1991); Evan T. Tagert, Comment, The Supreme Court, Effect Inquiry, and Aid to Parochial Education, 37 Stan. L.Rev. 219, 230-31 (1984).

Nevertheless, one thing is certain: the Supreme Court has never permitted broad sponsorship of religious schools. In those instances in which the Court has permitted funding to flow to religious schools, it has been in the context of a targeted grant, available to a limited population, for a specific purpose. See, e.g., Agostini v. Felton, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (upholding a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis, taught on the premises of sectarian schools by government employees); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993) (holding that providing a deaf student with a government-paid sign language interpreter who accompanies the student to classes in a sectarian school does not violate the Establishment Clause). "The problem, like so many problems in constitutional law, is one of degree." Meek, 421 U.S. at 359, 95 S.Ct. 1753 (citation and internal quotation marks omitted). We find no authority in the Court's jurisprudence for now extending state support of sectarian schools from beyond the class of particular, limited situations described above. See supra note 5.

Moreover, reliance by plaintiff-appellants on the Supreme Court's decision in Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), is misplaced. In Rosenberger, the University of Virginia, a state instrumentality, authorized payment to outside contractors for the printing costs of a variety of publications issued by several student organizations. These payments, made from an activities fund generated by imposing mandatory student fees, were designed to support a broad range of extracurricular student activities related to the University's educational purpose. The University withheld authorization for payments to a printer with respect to one student organization's publication because it deemed it to be contrary to University guidelines prohibiting aid to religious organizations or activities. The student organization in question, as well as the publications for which printing costs were sought, promoted a "Christian" viewpoint. The University's denial of printing payments was successfully challenged by the student organization on the basis of viewpoint discrimination. See id. at 832-35, 115 S.Ct. 2510; see also Regan v. Taxation with Representation, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) (holding that the state cannot discriminate based on the viewpoint of private persons whose speech it subsidizes).

In answering the University's concerns that such payments might run afoul of the First Amendment, the Court ruled that the funding did not contravene the Establishment Clause because it was "neutral towards religion." Id. at 840, 115 S.Ct. 2510. The neutrality of the program, the Court reasoned, distinguished it from a tax levied to directly support a church. [FN9] See id. There is a critical difference "between government speech [or action] endorsing religion, which the Establishment Clause forbids, and private speech

[or action] endorsing religion, which the Free Speech and Free Exercise Clauses protect." Id. at 843, 115 S.Ct. 2510 (emphasis in original, internal quotation marks omitted).

> FN9. "Our decision ... cannot be read as addressing an expenditure from a general tax fund...." Id. at 841, 115 S.Ct. 2510.

Most telling, from the perspective of the present case, is the majority's analysis of the issues presented by that appeal:

> The Court of Appeals (and the dissent) are correct to extract from our decisions the principle that we have recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions. The error is not in identifying the principle, but in believing that it controls this case ... [T]he Court of Appeals decided a case that was, in essence, not before it, and the dissent would have us do the same. We do not confront a case where, even under a neutral program that includes nonsectarian recipients, the government is making direct money payments to an institution or group that is engaged in religious activity.... [T]he undisputed fact [is] that no public funds flow directly to [the student organization's] coffers.

Id. at 842, 115 S.Ct. 2510 (emphasis added, internal citations omitted).

In lauding neutrality as the keystone of Establishment Clause jurisprudence, plaintiff-appellants forget that neutrality is but one "hallmark of the Establishment Clause."

Rosenberger, 515 U.S. at 846, 115 S.Ct. 2510 (O'Connor, J., concurring). Rosenberger neither trumpets the supremacy of the neutrality principle nor signals the demise of the funding prohibition in Establishment Clause jurisprudence. See id. at 852, 115 S.Ct. 2510 (O'Connor, J., concurring).

The historic barrier that has existed between church and state throughout the life of the Republic has up to the present acted as an insurmountable impediment to the direct payments or subsidies by the state to sectarian institutions, particularly in the context of primary and secondary schools. See Tilton v. Richardson, 403 U.S. at 684-87, 91 S.Ct. 2091 (relying on the lessened danger of prohibited entanglement when college level institutions are involved); Hunt v. McNair, 413 U.S. 734, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973) (upholding the creation of a public agency designed to assist in the placement of revenue bonds for the construction of buildings designed for secular use at higher education facilities including parochial colleges). Although the guidance provided by the Supreme Court has been less than crystalline, perhaps often by necessity due to the subject matter involved, approving direct payments of tuition by the state to sectarian schools represents a quantum leap that we are unwilling to take. Creating such a breach in the wall separating the State from secular establishments [FN10] is a task best left for the Supreme Court to undertake. [FN11]

> FN10. "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." Everson, 330 U.S. at 18, 67 S.Ct. 504. Nevertheless, the Court upheld the reimbursement to parents from public funds for the cost of fares paid by them for public transportation by public carriers of

children attending public and Catholic schools. See id.

FN11. "We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decision, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Agostini, 521 U.S. at 238, 117 S.Ct. 1997 (citation and internal quotation marks omitted).

Finally, we are at a loss to understand why plaintiff-appellants believe that the Establishment Clause gives them a basis for recovery. The Establishment Clause forbids the making of a law respecting the establishment of any religion. There is no relevant precedent for using its negative prohibition as a basis for extending the right of a religiously affiliated group to secure state subsidies.

II. Equal Protection

Plaintiff-appellants argue that in addition to violating the Establishment Clause, Maine's alleged hostility towards religion violates their rights under the Equal Protection Clause of the Fourteenth Amendment. They claim that by virtue of the statute in question they are being discriminated against on the basis of religion, religious beliefs, speech content, and association.

Plaintiff-appellants' equal protection claims fail for many

of the same reasons that their Establishment Clause challenge founders. Writ simple, the state cannot be in the business of directly supporting religious schools. Plaintiff-appellants' equal protection claims fail, because, regardless of the appropriate level of scrutiny we employ, the state's compelling interest in avoiding an Establishment Clause violation requires that the statute exclude sectarian schools from the tuition program. [FN12]

> FN12. Unlike our concurring brother, we find it necessary to decide the Establishment Clause issue because we agree with the Maine Supreme Court that "If the State's justification [had been] based on an erroneous understanding of the Establishment Clause, its justification w[ould] not [have] withst[oo]d any level of scrutiny." Bagley v. Raymond School Dep't, 728 A.2d 127 (Me.1999).

Plaintiff-appellants allege on appeal that they "have been singled out simply because they desire their children to be educated in a Christian environment and from a biblical perspective, and for no other reason." Appellants' Br. at 23-24. Plaintiff-appellants desire that the state pay grants directly to sectarian schools, in this case St. Dominic's, to subsidize their children's schooling. Given the present state of jurisprudence, we can see no way in which this can be done without violating the Establishment Clause. See Nyquist, 413 U.S. at 780, 93 S.Ct. 2955. As a result, we find no Equal Protection Clause violation.

We are fortified in our conclusion by the Maine Supreme Court's recent opinion in Bagley v. Raymond School Department, 728 A.2d 127 (Me.1999), dealing with a similar situation. In resolving a similar Equal Protection Clause

challenge, the court stated:

> That state funds would flow directly into the coffers of religious schools in Maine were it not for the existing exclusion cannot be debated. If the religious school exclusion were eliminated, the State would likely pay more than $5,000 per student to Cheverus High School, without restriction on the use of those funds. In the entire history of the Supreme Court's struggle to interpret the Establishment Clause it has never concluded that such a direct, unrestricted financial subsidy to a religious school could escape the strictures of the Establishment Clause. While it may be possible for the legislature to craft a program that would allow parents greater flexibility in choosing private schools for their children, the current program could not be easily tailored to include religious schools without addressing significant problems of entanglement or the advancement of religion.

Bagley, 728 A.2d at 147.

III. Free Exercise

Plaintiff-appellants argue that § 2951(2) violates the Free Exercise Clause of the First Amendment because it excludes funding of sectarian education solely on the basis of religion. However, we conclude that the Free Exercise Clause is not implicated here. See Sherbert v. Verner, 374 U.S. 398, 412, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963) (Douglas, J., concurring) ("[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the

government.").

Four points support our conclusion. First, at least some of the parents in this litigation eschew any religious motivation for wishing to attend St. Dominic's. For them, academic superiority, rather than the school's Roman Catholic affiliation, drives their enrollment decisions.

Second, no one plausibly reading the statute could come to any conclusion other than that § 2591(2) does not prevent attendance at a religious school. Nor does § 2591(2) prevent religious education of children in Maine. All it means is that the cost of religious education must be borne by the parents and not the state.

Third, Hernandez v. Commissioner, 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989), identifies the free exercise inquiry as asking "whether government has placed a substantial burden on the observation of a central belief or practice." (emphasis added). Factually speaking, education at a parochial school is not such a belief, for the Roman Catholic Church does not mandate it. See Catechism of the Catholic Church 537-38 (1994) (stating that parents' responsibilities for religious education for religious education takes place primarily in the home and that choosing a religious school is a right but not an absolute duty). To be sure, the Catholic Church requires some religious education, see id. at 538, but as stated above, § 2591(2) does not prevent such religious education. Indeed, it says nothing about it. Moreover, no parent makes the claim that attendance at a religious school is a central tenet or practice of their faith.

Fourth, the primary case cited by the parents, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S.

520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), is inapposite. In that case, the record showed a substantial animus against Santeria that motivated the law in question. See id. at 543, 113 S.Ct. 2217 (stating that the "record in this case compels the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances."). No such showing has been made here.

As we mentioned earlier, even if this were a limit on free exercise, the state has justified the limit by its purpose of avoiding violation of the Establishment Clause.

IV. Due Process and Speech Clause Claims

Plaintiff-appellants argue that § 2951(2) violates the Due Process Clause of the Fourteenth Amendment and the Speech Clause of the First Amendment by preventing appellants from using their tuition allotments to expose their children to the educational message which best reflects their morals and values.

First, the parents argue that they have a fundamental right to direct the upbringing and education of their children based on substantive due process rights that arise from Supreme Court decisions. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). On that general proposition, we do not disagree. However, that fundamental right does not require the state to directly pay for a sectarian education. Here, the statute does not prevent the parents from doing what they wish; it only prevents the state from helping pay for their wishes. We reject this contention out of hand.

Second, on the free speech side, plaintiff-appellants

contend that § 2591(2) violates their rights because it denies parents the right to communicate and instruct their children in the areas of religion, morals and ethics which they cannot accomplish in non-sectarian schools. With little more than academic articles to bolster their view, we find this claim to be meritless as well.

CONCLUSION

The judgment of the district court is affirmed. Costs are imposed against appellants.

LEVIN H. CAMPBELL, Senior Circuit Judge, concurring.

I agree that plaintiffs have not shown that Maine's statute subsidizing attendance at non-sectarian private schools, in communities lacking public schools, is unconstitutional. But I see no need for this court to decide that a broader statute (i.e., one also subsidizing attendance at sectarian private schools) would violate the establishment clause of the First Amendment ("Congress shall make no law respecting an establishment of religion").

For the reasons stated by my colleagues, supra, I agree that the Maine statute, as presently written, does not violate the free exercise clause of the First Amendment nor principles of substantive due process.

My colleagues and I part company, however, in our analysis of plaintiffs' establishment clause and equal protection clause claims. The Maine tuition statute was narrowed in 1981 to exclude religiously-affiliated schools in response to a decision of the Maine Attorney General

concluding that the inclusion of religiously-affiliated schools in Maine's tuition program violated the establishment clause of the federal Constitution. See Bagley, et al. v. Raymond School Department, 728 A.2d 127 (Me.1999). Last month, the Maine Supreme Judicial Court upheld the continued constitutionality of the exclusion of sectarian schools, holding that to fund them would violate the establishment clause. My colleagues apparently believe, as did the Maine court, that since the Maine legislature excluded sectarian schools because of establishment clause concerns, the latter must be addressed by us: the Maine court, indeed, suggested that if allowing tuition benefits to the sectarian schools would not violate the establishment clause, then denying such benefits would violate the equal protection clause, as denial would not then withstand even the minimal, "rational basis," scrutiny under the Constitution's equal protection clause. [FN13] In such event, plaintiffs would have succeeded in demonstrating that the current statute is unconstitutional, being violative of the equal protection clause.

> FN13. The Maine Supreme Judicial Court actually believed that strict scrutiny was called for, religion being a fundamental right, but that even under a rational basis standard the exclusion of religious schools would violate equal protection (assuming no establishment clause bar) because of the irrationality of denying them tuition benefits if the legislature's sole apparent reason for denial was legally incorrect.

While I understand the above rationale, I think it goes further than necessary. I prefer not to render an opinion based on speculation as to the constitutionality of a statute different from the one under discussion. Contrary to what my colleagues seem to suggest, supra, ours is not a case that

involves the "imbroglio" of direct subsidies paid to sectarian schools. Rather, the Maine legislature, acting on the basis of an opinion issued by its Attorney General, has expressly excluded sectarian schools from the possibility of receiving subsidies. The question is whether the current statute is unconstitutional, not whether a more inclusive one would be.

Plaintiffs argue that various constitutional provisions, including, oddly, the establishment clause itself, are offended by denying tuition benefits to sectarian schools. But none of plaintiffs' theories of unconstitutionality work. The establishment clause certainly provides plaintiffs with no affirmative basis for requiring the funding of sectarian schools, for reasons well explained by the Maine Supreme Judicial Court in its recent decision, 728 A.2d at 134-35, and by my colleagues.

Because plaintiffs' attempt to use the establishment clause as a sword fails, and because the Maine statute does not, for the reasons stated by my colleagues, violate the free exercise clause, no fundamental right is implicated here for equal protection purposes. Thus, the proper level of scrutiny under the equal protection clause is the most deferential--rational basis review. See Johnson v. Robison, 415 U.S. 361, 375 n. 14, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974) (where Act did not violate appellee's right of free exercise of religion, court has no occasion to apply a standard of scrutiny stricter than rational basis test); see also Griffin High School v. Illinois High School Ass'n, 822 F.2d 671, 674 (7th Cir.1987).

In my view, plaintiffs' equal protection clause claim fails not because, as my colleagues conclude, the Maine Attorney General's opinion relied upon by the legislature was necessarily correct that including sectarian schools would or

might violate the establishment clause, hence was better left alone. Rather, the action of the Maine legislature need only be supported by a rational basis, not one that turns out to be correct on the merits. Rational basis review is "a paradigm of judicial restraint" ... and "[w]here there are 'plausible reasons' for [the action of the legislature], 'our inquiry is at an end.' " FCC v. Beach Communications, Inc., 508 U.S. 307, 314, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)(quoting United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980)). See also Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 672, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981) ("the Equal Protection Clause is satisfied if we conclude that the California Legislature rationally could have believed " that the measure promoted its objectives) (emphasis in original).

The Maine legislature rationally could have believed that including sectarian schools within its funding scheme would or might violate the establishment clause, hence was better left alone. Several opinions of the United States Supreme Court cited by my colleagues and by the Maine Supreme Judicial Court undoubtedly lend support to such a viewpoint. See, e.g., Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973). These precedents are not conclusive, however, and many commentators interpret the more recent cases as indicating that the Supreme Court will uphold state tuition schemes that provide funding to sectarian as well as non-sectarian schools. The fact is that establishment clause jurisprudence as applied to this particular area is so unclear today that no court other than the Supreme Court can reliably resolve whether a statutory scheme like Maine's would violate the establishment clause were it to fund sectarian as well as non-sectarian schools. In spite of this uncertainty, however, the Maine

legislature's fear, based on its Attorney General's analysis, that including sectarian schools would violate the establishment clause was and remains entirely rational. While the odds were perhaps stronger in 1981 than they are today, existing case law still provides a reasonable basis for legislative refusal to extend tuition grants to sectarian schools. I see the Maine legislature, in 1981 and to this moment, as having rationally and prudently excluded sectarian schools because of a well-founded concern--whether or not ultimately correct--that to do otherwise will or may violate the establishment clause. The existence of that fear is rational enough, I think, to meet equal protection (and free exercise) requirements, however defined.

This is not to say that the Supreme Court may not someday decide that inclusion of sectarian schools in a scheme like this is permissible under the establishment clause. A strong argument can be made to that effect. Were the Supreme Court to so rule, plaintiffs might then be in a position to seek relief on free exercise or equal protection grounds, for under those circumstances the legislative basis for the exclusion of sectarian schools--the fear that the establishment clause bars their inclusion--will have been negated. But in today's climate, lacking further Supreme Court enlightenment, plaintiffs cannot demonstrate that the Maine statute violates any provision of the Constitution. Accordingly, I agree that we should affirm the judgment of the district court, but--like that court--I see no need whatever to reach out and decide the thorny establishment clause issue--an issue that, as my colleagues also recognize, can be meaningfully resolved only by the Supreme Court itself.

APPENDIX B

Elwood STROUT, et al., Plaintiff,
v.
COMMISSIONER, MAINE DEPARTMENT OF EDUCATION, Defendant.

No. Civ. 97-259-P-H.

United States District Court,
D. Maine.

Aug. 11, 1998.

Defendants' motion granted; plaintiffs' motion denied.

Stephen C. Whiting, Douglas, Denham, Rogers & Hood, Portland, ME, Vincent P. McCarthy, The American Center for Laws and Justice-Northeast Inc., New Milford, CT, for Plaintiff.

Peter J. Brann, Assistant Attorney General, Augusta, ME, for Defendant.

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

HORNBY, Chief Judge.

Some school districts in Maine do not have public high schools. Instead, they have found it more cost effective to pay tuition for their resident students directly to public high schools in other districts or private schools. Maine statutes permit the procedure but allow such payments to be made only to nonsectarian schools. The issue in this case is whether such a limitation is constitutional. I conclude that it is.

Facts

Maine law provides for compulsory education for school-aged residents. 20- A M.R.S.A. § 5001-A. Towns and school districts in Maine that do not operate their own public high schools can meet their statutory responsibilities by paying tuition to other public high schools or state-approved private schools at the legal tuition rate. 20-A M.R.S.A. § 5204(4). Under state law, only nonsectarian schools are eligible for receipt of public funds for tuition purposes. 20-A M.R.S.A. § 2951(2).

Each of the plaintiffs lives in Minot. The town of Minot is one of three towns comprising School Union No. 29, and neither Minot nor School Union No. 29 operates its own secondary school. These parents accordingly have chosen to send their children to St. Dominic's Regional High School, a private, Catholic sectarian school. After unsuccessfully seeking reimbursement for tuition paid to St. Dominic's in the fall of 1996, Mr. and Mrs. Strout, along with the other plaintiffs, brought this lawsuit against the Maine Commissioner of Education asserting that 20-A M.R.S.A. § 2951(2) is unconstitutional. Both sides have moved for summary judgment and agree that there are no genuine issues of material fact.

Analysis

The general norm in Maine, as in most parts of the country, is for a school district to provide a secular high school education at a public high school financed, owned and operated by the school district. Such public high schools must be nonsectarian to comply with the Constitution if not with the electorate's preferences. If a state permits a school district to choose not to build and operate its own public high

school, can it achieve the same objective of providing a secular education by allowing subsidy payments only to nonsectarian schools--whether they be public high schools in another district or private nonsectarian schools--while at the same time denying subsidy payments to sectarian schools? By all logic, the answer is yes, and the plaintiffs have provided no authority to the contrary.

I am not called upon here to decide whether a state may make other choices-- for example, to make a payment to its students of high school age that they could then spend at any school they choose, whether sectarian or nonsectarian. The plaintiffs have provided caselaw that suggests the United States Supreme Court is not as restrictive as it once was in testing such programs against First Amendment restrictions. See, e.g., Agostini v. Felton, 521 U.S. 203, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993); Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986). [FN1] Whether Maine might permit its school districts ultimately to choose to provide such options and whether the practice would be constitutional is a case for another day. I decide today only whether Maine is constitutionally required to extend subsidies to sectarian schools. I find no authority for such a requirement. Although the plaintiffs have phrased their arguments in terms of free exercise claims, establishment clause claims, equal protection claims and substantive due process claims, I find it unnecessary to address these separately or to analyze the various tests that have been enumerated. The same answer is obvious for all. [FN2]

FN1. The Wisconsin Supreme Court has recently upheld a school voucher program that can be used at

sectarian as well as nonsectarian schools. Jackson v. Benson, 218 Wis.2d 835, 578 N.W.2d 602, 620 (1998).

FN2. The state superior court has recently reached the same conclusion. See Bagley v. Maine Dep't of Education (Mills, J.), No. CV97-484 (Me.Super.Ct. Apr. 20, 1998).

The plaintiffs certainly are free to send their children to a sectarian school. That is a right protected by the Constitution. Pierce v. Society of Sisters, 268 U.S. 510, 534, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). The law is clear, however, that they do not have the right to require taxpayers to subsidize that choice. That is true in a district that builds and operates its own public high school, Brusca v. State Bd. of Education, 332 F.Supp. 275, 277 (E.D.Mo.1971), aff'd 405 U.S. 1050, 92 S.Ct. 1493, 31 L.Ed.2d 786 (1972); it is also true in a district that has no public high school. [FN3]

FN3. This is not a forum case like Rosenberger v. Rector, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), and the analysis of that case does not apply.

The defendants' motion for summary judgment is GRANTED and the plaintiffs' motion for summary judgment is DENIED.

SO ORDERED. [FN4]

FN4. The plaintiffs challenge the determination of what is a "sectarian" school and assert that the Department applies the prohibition to only

"pervasively sectarian" schools, thereby creating excessive entanglement contrary to the First Amendment. On the summary judgment record, however, it is admitted that the Department accepts the self-identification provided by the schools and that there has never been a dispute over the issue. See Commissioner's Statement of Material Facts ¶ 23 (unopposed; see Local Rule 56). The entanglement issue is therefore specious.

APPENDIX C

20-A M.R.S.A. § 2951. Approval for tuition purposes

A private secondary school may be approved for the receipt of public funds for tuition purposes only if:

1. **Basic approval**. Meets the requirements for basic school approval under subchapter I;

2. **Nonsectarian.** Is a nonsectarian school in accordance with the First Amendment of the United States Constitution;

3. **Incorporated.** Is incorporated under the laws of the State of Maine or of the United States;

4. **Repealed.** Laws 1983, c. 859, § A, 8.

5. **Additional requirements.** Complies with the reporting and auditing requirements in sections 2952 and 2953 and the requirements adopted pursuant to section 2954;

6. **Student assessment.** Any school which enrolls 60% or more publicly-funded students, as determined by the previous year's October and April average enrollment, shall participate in the statewide assessment program to measure and evaluate the academic achievements of the students; and

7. **Release of student records.** Upon the request of a school unit, release copies of all student records for students transferring from the private school to the

school unit.

20-A M.R.S.A. § 5204(4) Secondary students right to attend school in another administrative unit

The following provisions govern the right of secondary students to attend school in another administrative unit other than the one in which they are resident.

* * *

4. **No secondary school.** Secondary students whose parents reside in a unit which neither maintains a secondary school nor contracts for secondary school privileges may attend a private school approved for tuition purposes, a public school in an adjoining unit which accepts tuition students, or a school approved for tuition purposes in another state or country upon permission of officials of the receiving school. The school administrative unit where the students' parents reside shall pay tuition in the amount up to the legal tuition rate as defined in chapter 219.*

* Section 5801 et seq. of this title.

Supreme Court, U.S.
FILED
SEP 13 1999
OFFICE OF THE CLERK

No. 99-254

In The

Supreme Court of the United States

ELWOOD STROUT, *et al.*,

Petitioners,

v.

J. DUKE ALLBANESE,

Respondent.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court Sitting As The Law Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the First Amendment of the United States Constitution require the State to pay unrestricted, direct subsidies to a pervasively sectarian school for a religious education?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, J. Duke Albanese, Commissioner of the Maine Department of Education, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the decision and judgment of the United States Court of Appeals for the First Circuit, issued on May 27, 1999, reproduced in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 1a-24a, reported in *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999).

STATEMENT OF THE CASE

This petition parallels that of *Bagley v. Raymond School Department*, 728 A.2d 127 (Me. 1999), *petition for cert. filed*, 68 U.S.L.W. 3105 (U.S. Aug. 10, 1999) (No. 99-163). The Maine Law Court in *Bagley* and the First Circuit in this case each upheld Maine's school voucher program against First Amendment challenges. Although petitioners in the present case seek to characterize their challenge more creatively, the core issue is their effort to require the State to pay an unrestricted, direct public subsidy to a pervasively sectarian high school for religious education. Such an unfettered subsidy has never been required or even permitted by this Court or in any of the cases referred to by petitioners.

The parties generally agree that the material facts are undisputed. The State of Maine operates a tuition program. Maine requires all school districts to provide education for their residents from kindergarten to the 12th grade. 20-A M.R.S.A. § 1001(8). Approximately one-half of the school districts satisfy this obligation by operating

their own elementary and secondary schools. Petitioners do not suggest that in such circumstance, the district must pay for or in any way subsidize a separate sectarian education.

Due to the lack of density of population, the other half of the school districts, including that of the Town of Minot, fulfill their public education obligation through a tuition program established pursuant to 20-A M.R.S.A. § 5204. Under this alternative program, these districts do not operate their own public schools, but rather pay tuition for their students to attend other schools.

Pursuant to Maine's school voucher program, the school district pays tuition directly to a public school or to a private school that has been approved for tuition purposes pursuant to 20-A M.R.S.A. § 2951. The statute specifically provides that sectarian schools are ineligible for approval for tuition purposes. 20-A M.R.S.A. § 2951(2). Nearly 14,000 students attend public or approved private schools under the tuition program, resulting in the expenditure of approximately $70 million in public funds.

Minot operates a public school for kindergarten through 8th grade, which all of the petitioners' children attend. However, Minot does not run a high school, and instead provides secondary education through the tuition program. The petitioners – three sets of parents in Minot – decided to send their children to St. Dominic Regional High School in Lewiston, Maine. St. Dominic is a pervasively sectarian Catholic high school. Because St. Dominic's tuition is less than the maximum allowable tuition under the program, all of the tuition at St.

Dominic's would be paid by the government. Petitioners decided to send their children to St. Dominic for a variety of reasons, including availability, academics, and atmosphere, and although all of the petitioners believe that the religious aspects of St. Dominic are a positive factor, none of the petitioners contend that a central tenet of their religion compelled them to send their children to that school.

On November 21, 1997, petitioners filed suit against the Commissioner of the Maine Department of Education, as well as several local defendants.[1] Petitioners contended that the district was required by the First Amendment to make direct, unrestricted payments to the pervasively sectarian high school for their children's religious education. The petitioners and the Commissioner filed cross-motions for summary judgment, and on August 11, 1998, the District Court (Hornby, J.) granted the Commissioner's cross-motion, concluding that:

> I decide only whether Maine is constitutionally required to extend subsidies to sectarian schools. I find no authority for such a requirement. Although the plaintiffs have phrased their arguments in terms of free exercise claims, establishment clause claims, equal protection claims and substantive due process claims, I find it unnecessary to address these separately or to analyze the various tests that have been enumerated. The same answer is obvious for all.

---

[1] The local defendants included the Minot School Committee, Maine School Union #29, and the Superintendent of School Union #29. These defendants were dismissed out of the case, which is not an issue being raised before this Court.

> The Plaintiffs certainly are free to send their children to a sectarian school. The right is protected by the Constitution. The law is clear, however, that they do not have the right to require taxpayers to subsidize that choice. That is true in a district that builds and operates its own public high school; it is also true in a district that has no public high school.

Strout v. Commissioner, Maine Department of Education, 13 F.Supp.2d 112, 114 (D.Me. 1998), reproduced at Pet. App. at 27a (citations and footnotes omitted).

On appeal, the First Circuit affirmed unanimously. Unlike the District Court, Chief Judge Torruella, writing for Judge Stahl and himself, addressed seriatim each of the bases upon which petitioners challenged the school voucher system. First addressing the Establishment Clause, the court was

> at a loss to understand why plaintiffs-appellants believe that the Establishment Clause gives them a basis for recovery. The Establishment Clause forbids the making of a law respecting the establishment of any religion. There is no relevant precedent for using its negative prohibition as a basis for extending the right of a religiously affiliated group to secure state subsidies.

Pet. App. at 15a. The court touched upon the use of the direct-indirect aid distinction as an instructive guideline but explained further that "one thing is certain: the Supreme Court has never permitted broad sponsorship of religious schools." *Id.* at 11a. The First Circuit observed that the only instances where the Supreme Court has permitted funding to flow to religious schools have been

in the context of a targeted grant, available to a limited population, for a specific purpose. *Id.* The court correctly noted that the petitioners' reliance upon "neutrality as the keystone of the Establishment Clause jurisprudence" forgets that neutrality is but one factor to be considered. *Id.* at 13a-14a.

The court then went on to deal with petitioners' equal protection argument, concluding that it failed because "[g]iven the present state of jurisprudence, we see no way in which" requiring the State to pay grants directly to sectarian schools to subsidize children's schooling "can be done without violating the Establishment Clause." *Id.* at 16a.

Petitioners' free exercise claim was disposed of on a variety of grounds, including, *inter alia*, Maine's voucher system does not prevent attendance at a religious school – all it means is that the costs of religious education must be borne by the parents and not the State; and religious education is not a central tenet of petitioners' religious practice. *Id.* at 18a-19a. Finally, petitioners' due process claim was summarily disposed of because, although substantive due process precludes the State from preventing individuals from obtaining a religious education, it does not *require* the State to directly pay for a sectarian education. *Id.* at 19a. Regarding the free speech claim, the court correctly noted that there is "little more than academic articles to bolster the[ ] view" that the parents' rights to communicate and instruct their children in the areas of religion, morals and ethics, are somehow infringed upon. *Id.* at 20a.

Senior Circuit Judge Campbell wrote a concurring opinion, concluding that Maine law does not violate the free exercise clause nor principles of substantive due process. *Id.* at 20a. Judge Campbell further concluded that neither the Establishment nor equal protection clauses provide petitioners with an affirmative basis for requiring funding of sectarian schools, and, therefore, provide no basis for affirmative relief. *Id.* at 20a-21a. It was, thus, unnecessary, according to Judge Campbell, to reach the level of analysis of the Establishment Clause presented by Judge Torruella. Under the rational basis standard, Maine's statute did not violate petitioners' equal protection rights. *Id.* at 21a-23a.

REASONS FOR DENIAL OF THE WRIT

Just as in the petition in *Bagley*, there is no compelling reason for the Court to review the First Circuit's decision in this case. First, as in the case of *Bagley*, the issues the petitioners wish to present to the Court are not properly framed. Second, and more significantly, this Court, and the lower courts, have been both clear and consistent throughout the development of the jurisprudence surrounding the First Amendment that unrestricted, direct subsidies to pervasively sectarian schools for religious education violates the Establishment Clause. Moreover, as noted by both lower courts that have considered the issue, this Court has never hinted that the Establishment Clause *required* the government to affirmatively make such a subsidy.

I. THE COURT SHOULD DENY THE WRIT BECAUSE THE ISSUES ARE NOT PROPERLY FRAMED.

Petitioners here ignore a fatal deficiency rendering this matter inappropriate for certiorari. As a matter of fact, education at a parochial school is not a central religious belief or practice of these petitioners. Pet. App. at 18a. "The free exercise inquiry asks whether the government has placed a substantial burden on the observance of a *central* religious belief or practice . . . " *Hernandez v. Commissioner,* 490 U.S. 680, 699 (1989) (emphasis added). Thus, this is not a case for the Court to consider the First Amendment issues as sought by petitioners.

II. THE FIRST CIRCUIT DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS.

The First Circuit's decision is in full conformance with this Court's precedents involving the Establishment Clause.[2] In developing its First Amendment jurisprudence over the last three decades, the Court has focused on the specific features of the particular government action before it, cautioning further that the Court's precedent remains intact unless directly overruled. *Agostini v. Felton,* 521 U.S. 203, 237 (1997); *Rosenberger v. Rector &*

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[2] Although petitioners parse their petition into five separate questions, presenting challenges based upon the Establishment Clause, the Equal Protection Clause, the Free Exercise Clause, substantive due process, and the Free Speech Clause (Petition at i-ii), the substance of their petition deals almost exclusively with Establishment Clause jurisprudence. We will therefore focus our attention in this area.

Visitors of the University of Virginia, 515 U.S. 819, 852 (1995) (O'Connor, J., concurring). The Court has consistently and clearly stated that neither the Establishment Clause nor the Free Exercise Clause requires, or even allows, direct, unrestricted governmental financial subsidies to a sectarian school for a religious education. The invalidity of such payments to religious schools for a religious education has not been questioned. The jurisprudence surrounding the Establishment Clause has developed in an effort to determine whether particular types of aid constitute unconstitutional direct payment of public funds from the government to a religious school.

Petitioners certainly have the right to send their children to a private sectarian school. However, efforts to *require* a government to pay for assistance to sectarian schools have been consistently rejected. *Luetkemeyer v. Kaufmann*, 364 F.Supp. 376 (W.D. Mo. 1973) (3-judge court), *aff'd mem.* 419 U.S. 888 (1974) (refused to require state to provide transportation to parochial school children although it could do so under Establishment Clause); *Brusca v. Missouri*, 332 F.Supp. 275 (E.D. Mo. 1971) (3-judge court), *aff'd mem.* 405 U.S. 1050 (1972) (claim that state must provide tuition assistance to children to attend sectarian school rejected under rational basis scrutiny).[3] This Court has held in several contexts "that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe that right . . . " *Regan v. Taxation With Representation*, 461 U.S. 540, 546, 549 (1983) (rejected the "notion that First Amendment

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[3] Such affirmances are adjudications on the merits. *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975).

rights are somehow not fully realized unless they are subsidized by the State"), *quoting Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring); *see also Rust v. Sullivan*, 500 U.S. 173, 201 (1991) ("the Government has no constitutional duty to subsidize an activity merely because the activity is constitutionally protected") (citation omitted). As noted by the lower court, petitioners' efforts to use the Establishment Clause's "negative prohibition" as a sword to *require* state subsidies is without precedent. Pet. App. at 15a.

Further, those cases that have considered the type of aid the government *may*, if it chooses, provide to sectarian schools have consistently rejected the type of subsidies sought by petitioners. In *Community for Public Education v. Nyquist*, 413 U.S. 756 (1973), the Court had before it three forms of educational aid: direct grants to nonpublic schools, tuition reimbursement to parents, and tax deductions to parents. The Court struck down direct unrestricted grants to sectarian schools as anathema to the Establishment Clause. *Id.* at 774-76. The majority also rejected the two other forms of aid with regard to sectarian schools. Writing for the dissent, Justice Rehnquist only disagreed with those portions of the decision relating to tax credits and deductions, and did not dissent to the striking down of outright grants. *Id.* at 805-06. Indeed, Justice Rehnquist wrote that it was "clear that tax deductions and exemptions, even when directed to religious institutions, occupy quite a different constitutional status under the religion clauses of the First Amendment than do outright grants to such institutions." *Id.* at 806.

In *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 747 (1976), the plurality approved grants to private

colleges, including religious affiliated ones, of funds that could not be used for sectarian purposes. Again, the Court was clear that:

> The State may not, for example, pay for what is actually religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike.

Id. at 747.

Subsequent decisions of this Court have not questioned the invalidity of direct grants to sectarian schools for religious education. In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court upheld tax deductions for actual expenses incurred for the tuition, textbooks and transportation of dependents attending private sectarian as well as non-sectarian and public schools. In writing for the majority, Justice Rehnquist reiterated that the direct transmission of subsidies from the state to the sectarian schools themselves were invalidated by the Court and were of a different type of aid than that before the Court in *Mueller. Id.* at 399 & n. 11.

In *Witters v. Washington Department of Service for the Blind*, 474 U.S. 481 (1986), in upholding assistance to a blind person at a religious college, the Court again stated that it is well-settled "that the State may not grant to a religious school, whether cash or in kind, where the effect of the aid is 'that of a direct subsidy to the religious school' from the State." *Id.* at 487, *quoting Grand Rapids School District v. Ball*, 473 U.S. 373, 394 (1985). Indeed, the court noted "that aid to a religious institution unrestricted in its potential uses, if properly attributable to the

State, is 'clearly prohibited under the Establishment Clause' because it may subsidize the religious functions of that institution." *Id.* at 489 (citation omitted). Likewise, in upholding the provision of a sign language interpreter for a student at a religious school, the Court, in *Zobrest v. Catalina Foothills School District*, 509 U.S. 1, 12-13 (1993), emphasized that such services were valid because they were not direct financial support for non-public sectarian institutions.

This Court's decision in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), upheld the expenditure of University money to pay an independent contractor to print a student religious newspaper. There, too, the Court "recognized the special Establishment Clause dangers where the government makes direct money payments to sectarian institutions," which were not present in that case. *Id.* at 841, 842. In a concurring opinion, Justice O'Connor emphasized that the Court's decisions "provide no precedent for the use of public funds to finance religious activities," and the *Rosenberger* decision "neither trumpets the supremacy of the neutrality principal nor signals the demise of the funding prohibition in Establishment Clause jurisprudence." *Id.* at 847, 852. Justice O'Connor pointed out that the focus must be on the specific features of the particular governmental action put before it. *Id.* at 852. Petitioners misread *Rosenberger*, and attempt to meld two different areas of First Amendment jurisprudence: the free speech forum cases and the public subsidy cases. Petition at 7-15. This Court, however, drew a clear distinction between the two, noting that there is a fundamental difference between access to a public forum and access to a public

subsidy, and the decision "cannot be read as addressing an expenditure from a general tax fund . . . " 515 U.S. at 841.

Finally, this Court's decision in *Agostini v. Felton*, 521 U.S. 203 (1997), dealt with the provision of supplemental, remedial instruction – secular in nature – in private and parochial schools. The majority decision written by Justice O'Connor reasoned that these services were supplemental, and did not relieve sectarian schools of costs they otherwise must bear in educating their students. *Id.* at 228. The Court emphasized that no public funds ever reached the coffers of religious schools, reiterating that the nature of the aid that the government chooses to provide remains a critical factor. *Id.* at 232. The petitioners' brief is founded, in large part, upon the notion that the First Circuit made a fatal error misreading the direct versus indirect aid distinction. The argument suggests that indirect aid is always constitutional, and the Maine tuition voucher is indirect because the parent, not the government, decides where to send the child to school. Petition at 7-10. This theory is simply wrong. The First Circuit correctly relied upon this Court's precedent (*see, e.g., Agostini*, 521 U.S. at 232), that the nature of the aid remains a critical factor. Pet. App. at 11a. Here, the aid is direct *and* unrestricted *and* for a religious education *and* covers the entire cost of the tuition for that education. No precedent of this Court suggests such a subsidy would conform with the Establishment Clause. Indeed, all of the Court's statements are to the contrary.

In sum, this Court's cases have been unwavering in holding that direct, unrestricted financial subsidies to a pervasively sectarian school for religious education is

and remains unconstitutional. Certainly, there is no hint by the Court that a state is *required* to pay such subsidies. Thus, the First Circuit's decision is in full conformance with this Court's consistent holdings on the subject, and there is no ground for certiorari in this case. Sup.Ct.R. 10(c).

III. THE FIRST CIRCUIT DECISION DOES NOT CONFLICT WITH STATE DECISIONS.

The First Circuit's decision in *Strout* does not conflict with the three cases relied upon by petitioners at pages 14-19 of their brief. Preliminary, as noted above, in *Bagley v. Town of Raymond*, the Maine's highest court held this identical program to be in full conformance with the First Amendment.[4]

The petitioners first refer to the Wisconsin decision in *Jackson v. Benson*, 578 N.W.2d 602 (Wis.), *cert. denied*, 119 S.Ct. 466 (1998). In that case, the Wisconsin court had before it a program where public funds were paid to parents, not to the school, and the funds could only cover educational programs at sectarian or non-sectarian private schools. In a split decision, that court upheld the plan emphasizing that the program did not involve the direct flow of the subsidy from the government to the

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[4] Likewise, in *Columbia Union College v. Clark*, 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 119 S.Ct. 2357 (1999), the Fourth Circuit correctly found that direct funding to pervasively sectarian institutions would violate the Establishment Clause, and remanded the matter to determine whether the institution was, indeed, pervasively sectarian.

school. Indeed, the Court in *Jackson* went out of its way to distinguish that situation from direct funding of a pervasively sectarian education, and did not have before it an effort to *require* the government to pay for a religious education. Thus, there is no conflict with the First Circuit's decision on this point.

Petitioners next turn to the Ohio decision in *Simmons-Harris v. Goff*, 711 N.E.2d 203 (Ohio, 1999). In that case, the Court struck down on state constitutional grounds a school reimbursement program involving scholarships paid to the student's parents, who may use them at a sectarian school, noting that "[d]irect governmental subsidies to religious schools are clearly unconstitutional." *Id.* at 209. There, the issue was whether the government *could*, not *must*, provide the disputed funding. The Ohio court's dicta that the Establishment Clause is not violated by the scheme has since been repudiated, at least preliminarily, in *Simmons-Harris v. Zelman*, 1999 WL 668839 (N.D. Ohio 1999). The District Court granted a motion to preliminarily enjoin the Ohio program, concluding that the Ohio Supreme Court's reasoning regarding the Establishment Clause is unpersuasive and that there is "a very substantial chance" that the program will be found to violate the First Amendment. *Id.* at *16 & *17.[5] Thus, again, there is no conflict between the First Circuit and any binding precedent out of Ohio.

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[5] The district court issued a partial stay of the preliminary injunction on August 27, 1999, on the basis of temporary harm to children who relied upon the program, due to the imminent start of the school year. 1999 WL 669222 (N.D. Ohio 1999).

Nor does the First Circuit's decision conflict with the Arizona court's holding in *Kotterman v. Killiam*, 972 A.2d 606 (Ariz.), *petition for cert. filed*, 67 U.S.L.W. 3671 (U.S., Apr. 26, 1999) (No. 98-1760). There, in a 3-2 decision, the court upheld a complicated state tax credit because there were no direct subsidies, recognizing that such subsidies affront the Constitution. *Id.* at 616.[6]

As is obvious, these three cases do not involve direct subsidies from the government to a religious school to be used for religious purposes, and, indeed, each court went to great pains to distinguish the particular aid at issue from direct, financial subsidies. Moreover, they do not involve efforts to require the government to provide aid where it has chosen not to do so. Thus, there is no conflict, and there is no present need to address this issue. Sup.Ct.R. 10(a).

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[6] In passing, petitioners also refer to case law out of Vermont. However, the case primarily relied upon, *Campbell v. Manchester Board of School Directors*, 641 A.2d 352, 359 (Vt. 1994), clearly stated that it was not addressing the validity of direct payment to a sectarian institution. Subsequently, the Vermont court found the tuition reimbursement program, which called for payments to sectarian schools, to be unconstitutional under the provisions of the Vermont Constitution. *Chittenden Town School District v. Vermont Department of Education*, 1999 WL 378244 (Vt. 1999). Further, in considering the earlier *Campbell* case, the lower court rejected its holding, finding quite clearly that direct payments to sectarian schools in the Vermont program did violate the Establishment Clause. *Chittenden Town School District v. Vermont Department of Education*, No. S0478-96RC (Vt. Super. Ct., Rutland Cty., June 27, 1997).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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Supreme Court of the United States

ELWOOD STROUT, DEBORAH STROUT,
JOHN EULITT, BELINDA EULITT,
RICHARD ROY, and PATRICIA ROY,
Petitioners,

v.

J. DUKE ALBANESE, in his official capacity
as Commissioner, Maine Department of Education,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF TIMOTHY HUMPHREY, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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IN THE

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On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF TIMOTHY HUMPHREY, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Amici curiae Timothy Humphrey, *et al.*, submit this *Amici Curiae* Brief in Opposition to the Petition for a Writ of Certiorari.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this dispute authored this brief in whole or in part and that the National Education Association made a monetary contribution to the preparation and submission of this brief. This Brief is submitted with the written consent of the parties pursuant to Supreme Court Rule 37.

INTEREST OF THE *AMICI CURIAE*

Timothy Humphrey, Jane Humphrey, Frank McDermott, Timothy Morin, Joan Morin, Timothy Fitzgerald, Ken Williams, and Barbara Williams are defendants-intervenors in *Bagley v. Raymond School Department*, 728 A.2d 127 (Me. 1999), which is now pending before this Court on a Petition for Writ of Certiorari to the Supreme Judicial Court of Maine (Case No. 99-163). Because the instant case and *Bagley* present precisely the same constitutional question, *amici curiae* Timothy Humphrey, *et al.*, have an interest in the disposition of this case.

COUNTERSTATEMENT OF THE CASE

The State of Maine requires all public school districts to provide a free kindergarten through twelfth grade education to their residents. 20-A M.R.S.A. § 100(8). School districts may fulfill this statutory obligation by operating their own public schools, or by using public funds to pay the tuition for resident families to send their children to public or approved private schools pursuant to the State's education tuition program ("voucher program").

Sectarian private schools are ineligible to participate in the Maine voucher program: the governing statute provides that "[a] private secondary school may be approved for the receipt of public funds for tuition purposes only if it . . . [i]s a nonsectarian school in accordance with the First Amendment of the United States Constitution." 20-A M.R.S.A. § 2951(2). This case involves a constitutional challenge to the voucher program—specifically, to the program's exclusion of sectarian private schools.

Petitioners are the parents of children residing in the Minot school district—*i.e.*, School District 29. School

District 29 does not operate a public high school, but instead provides secondary education through the voucher program. Petitioners asked School District 29 to pay the tuition for their children to attend St. Dominic Regional High School—a pervasively sectarian private school. When the school district refused—citing the voucher program's specific exclusion of sectarian private schools—petitioners brought suit in the United States District Court for the District of Maine, claiming a violation of their rights under (1) the Establishment Clause of the First Amendment, (2) the Free Exercise Clause of the First Amendment, (3) the Free Speech Clause of the First Amendment, (4) the Due Process Clause of the Fourteenth Amendment, and (5) the Equal Protection Clause of the Fourteenth Amendment. The district court rejected all of petitioners' claims, and the First Circuit affirmed.

The First Circuit gave short shrift to petitioners' specific claims, devoting its attention primarily to the question of whether the Establishment Clause prohibits the use of public funds to pay tuition at a sectarian private school. The court below answered this question "yes," noting that this Court "has never permitted broad sponsorship of religious schools." *Strout v. Albanese*, 178 F.3d 57, 62 (1st Cir. 1999).

Judge Campbell filed a separate concurring opinion. Although agreeing with the other panel members that there was no merit to any of petitioners' claims, Judge Campbell departed from the majority in terms of analysis, opining that the majority had gone "further than necessary." *Id.* at 67. "The question," according to Judge Campbell, "is whether the current statute is unconstitutional, not whether a more inclusive one would be," *id.*, and he therefore saw "no need for [the court below] to decide that a broader statute (*i.e.*, one also subsidizing

attendance at sectarian private schools) would violate the Establishment Clause of the First Amendment . . . ." *Id.* at 66.

REASONS FOR DENYING THE WRIT

THE INSTANT CASE DOES NOT PROVIDE AN APPROPRIATE VEHICLE FOR RESOLVING THE ESTABLISHMENT CLAUSE QUESTION RAISED BY VOUCHER PROGRAMS THAT INCLUDE SECTARIAN PRIVATE SCHOOLS

A. In the Questions Presented section of their Petition for a Writ of Certiorari ("Pet."), petitioners set forth five separate questions, reasserting each of the constitutional claims rejected by the court below. But there is a major disconnect between these questions and the remainder of the Petition.

Although petitioners devote 13 pages of their Petition to a discussion of the "REASONS FOR GRANTING THE WRIT"—*i.e.*, pages 6-19—there is not a single reference to petitioners' claims under the Free Speech Clause (Questions Presented No. 2 and 5), the Equal Protection Clause (Question Presented No. 3), the Free Exercise Clause (Question Presented No. 4), or the Due Process Clause (Question Presented No. 5).[2] The Petition does to be sure make repeated reference to the Establishment Clause, but not to the Establishment Clause claim that actually was made by petitioners in the court below. That claim—*i.e.*, that the "negative prohibition" of the Establishment Clause provides petitioners with an affirmative "basis for extending the right of a religiously affiliated group to secure state subsidies," 178 F.3d at

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[2] Although the Due Process Clause is not expressly mentioned in Question Presented No. 5, the context indicates that the reference to the Fourteenth Amendment is intended to implicate that Clause.

64—was summarily rejected by the First Circuit, *id.*, and is not pursued here.

The Petition deals with only one question. This question—which, according to petitioners, is "[t]he central issue in this case [and] is one of great importance," Pet. at 6—is "whether the Establishment Clause of the First Amendment *requires* discrimination against the religious point of view in the provision of tuition assistance to parents of children attending private schools." *Id.* (emphasis in original).[3] *Cf.* Question Presented No. 1:

> Whether the Establishment Clause of the First Amendment requires the discriminatory exclusion of an otherwise eligible private school from a state tuitioning program just because that school is religious?

B. Viewed in these terms, the Petition in this case is on all fours with the Petition for Certiorari that is now pending before this Court in *Bagley, et al. v. Raymond School Department, et al.*, No. 99-163. *Bagley* involves a contemporaneous and virtually-identical challenge to Maine's voucher program in the state court system. *See* 178 F.3d at 64 ("We are fortified in our conclusion by the Maine Supreme Court's recent opinion in *Bagley v. Raymond School Department*, 728 A.2d 127 (Me. 1999), *dealing with a similar situation.*") (emphasis added).[4]

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[3] After attempting to develop this question on page 6 of the Petition, petitioners conclude the page by stating that "[t]he Petition also presents an important and substantial issues [sic] which necessitate review. This Court's [sic] should grant review." We are reluctant to speculate as to intent of this rather obtuse statement, but petitioners may be referring to their other constitutional claims.

[4] The one notable difference is that *Bagley* did not involve claims under the Due Process Clause of the Fourteenth Amendment or the Free Speech Clause of the First Amendment.

Because the Maine Supreme Court saw the case in precisely the same terms as did the First Circuit, and ruled accordingly, the Question Presented in the *Bagley* Petition is substantively the same as "[t]he central issue in this case." Pet. at 6. The *Bagley* petitioners have formulated their Question as follows:

> Does the Establishment Clause of the U.S. Constitution require the exclusion of religious schools from Maine's tuitioning program, which allows parents to choose from an array of public and private schools for their children's education?

Amici are intervening defendants in *Bagley*, and on August 30, 1999 they filed a Brief in Opposition to the Petition for Certiorari in that case (Brief in Opposition of Respondents Timothy Humphrey, *et al.* and Maine Civil Liberties Union; hereinafter "*Bagley Opp.*"). In that Opposition, *amici* agreed with petitioners that there is a need for further guidance from this Court on the important question of whether and under what circumstances public funds can be used to pay for pupils to attend sectarian private schools, but they argued that the *Bagley* case is not an appropriate vehicle for providing such guidance. *Amici* made two points in support of that argument.

1. The first point is that the *Bagley* case does *not* involve a program pursuant to which public funds are used to pay for sectarian private school education—as a result of which the Establishment Clause question is presented in a hypothetical context without the type of factual record that is essential to proper constitutional analysis. That point, of course, applies with equal force here. *See* 178 F.3d at 67 (Campbell, J., concurring) ("The question is whether the current statute is unconstitutional, not whether a more inclusive one would be.").

Accordingly, *amici* respectfully refer this Court to pages 7-11 of the *Bagley* Opposition.

2. The second point that *amici* made in the *Bagley* Opposition was that the finding of the Maine Supreme Court that the inclusion of sectarian private schools in the voucher program would violate the Establishment Clause was not necessary to the disposition of petitioners' claims. With one qualification, that point likewise is applicable here.

The Establishment Clause analysis of the Maine Supreme Court was undertaken in the course of the Court's consideration of petitioners' Equal Protection Clause claim. But the court found at the outset of that consideration that petitioners lacked standing to make such a claim, and that finding provided an independent basis for sustaining its judgment. The First Circuit—at least in terms—made no such finding here.

The other reason why the Maine Supreme Court's conclusion as to the prohibitory effect of the Establishment Clause was unnecessary was because petitioners' Equal Protection Clause claim should have been rejected on the basis of this Court's summary affirmances of the three-judge district court decisions in *Brusca v. Missouri*, 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972), and *Luetkemeyer v. Kaufmann*, 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974). *Cf.* 178 F.3d at 68 (Campbell, J., concurring) ("I see no need whatever to reach out and decide the thorny establishment clause issue . . . ."). This latter reason is also applicable here, and, accordingly, *amici* respectfully refer this Court to pages 13-18 in the *Bagley* Opposition.

CONCLUSION

The reasons for granting the Petition that are advanced by petitioners in this case are the same reasons that have been advanced by petitioners in *Bagley, et al. v. Raymond School Department, et al.*, Case No. 99-163. In *amici's* Brief in Opposition in *Bagley*, we explain why those reasons are insufficient, and urge this Court to address the important Establishment Clause question presented by voucher programs that include sectarian private schools not in the hypothetical and muddled context of the Maine voucher program, but rather in a case that presents that question in direct and pristine form. For the same reasons, the Petition for Writ of Certiorari should be denied in this case.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The issue in this litigation is whether the State of Maine can discriminatorily *exclude* from an educational assistance program, which program encompasses *private* schools, those students who attend private *religious* schools. The First Circuit held that while such governmental discrimination against religion would otherwise be unconstitutional, Pet. App. at 16a n.12, the Establishment Clause nevertheless *requires* such discrimination, *id.* at 15a, 16a, 19a.

Petitioners do *not* contend in this case that a State is required to fund private schools equally with public schools. There is no issue before this Court of the propriety of discrimination between aid to *public* schools versus private religious (or nonreligious) schools. Hence, the summary affirmances which Respondent cites on that distinct question, Opp. at 8, are irrelevant. Rather, in this case, the state has chosen to provide financial assistance to parents for their children's attendance at *private* schools but has categorically excluded the choice of *private religious* schools. This case, therefore, presents a situation of pure, *de jure* discrimination against religion.

Anti-religious discrimination has a long and odious history in this country, culminating in the "know-nothing" movement of the 19th and early 20th century.[1] In fact, at least one noted historian has said that it has been the most pervasive form of

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[1] Gaffney, Edward McGlynn, Jr., "*Hostility to Religion, American Style*", 42 DePaul L. Rev. 263, 1992; Gedicks, Frederick Mark, "*Public Life and Hostility to Religion*", 78 U. Va. L. Rev. 671,1992; Vitteritti, *Joseph P., "Blaine's Wake: School Choice, The First Amendment, and State Constitutional Law*,(1998) 21 Harv. J.L. & Pub. Pol'y 657.

bigotry in American history.[2] Maine's discrimination against religion is nothing more than official state bigotry dressed up in Establishment Clause clothing. The fair and equal treatment of religion in our society is long *overdue*: religion should receive the same treatment as other points of view, not better, not worse.

It is already settled law that the Establishment Clause *permits* neutral assistance plans in which private choice directs the flow of government aid. This is so even if the assistance is turned over to a religious school for the very purpose of religious training, *see Witters v. Washington Dep't of Serv's. for the Blind*, 474 U.S. 481 (1986) (aid used for religious seminary training), serves as a vehicle for the implementation of a religious education, *see Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993) (interpreter for deaf student), or takes place on the premises of a religious school, *see Agostini v. Felton*, 521 U.S. 203 (1997). These precedents turn on the crucial difference between government-directed schooling, on the one hand, and private parental or student choice of schooling, on the other. The Establishment Clause, which limits government action, poses no bar to the independent choice of private citizens to obtain, for themselves or their children, a religious education. Indeed, such a private choice enjoys constitutional protection. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

It is also settled law that the U.S. Constitution forbids governmental discrimination against private religious choices

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[2] Arthur Schlesinger said to Monsignor John Tracy Ellis: "I regard the prejudice against your church as the deepest bias in the history of the American people." John Tracy Ellis, *American Catholicism*, 61-69 (2d ed. 1969).

and, in particular, against private religious expression. This principle flows from the federal guarantees of free speech, *e.g., Widmar v. Vincent*, 454 U.S. 263 (1981); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rectors of Univ. of Va.*, 515 U.S. 819 (1995); free exercise of religion,[3] *e.g., Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); no establishment of religion, *see Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (Establishment Clause forbids government action which has primary effect of inhibiting religion); *Board of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) (anti-religious discrimination creates Establishment Clause problems); and equal protection, *see Clark v. Jeter*, 486 U.S. 456, 461 (1988) (classifications affecting fundamental rights trigger strict scrutiny).

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[3] Respondent would preclude this Court's consideration of Petitioner's Free Exercise Clause claim on the grounds that the Clause only protects a "*central* religious belief or practice," Opp. at 7 (emphasis added). But this Court has unanimously *rejected* any "centrality" test for Free Exercise claims. *Employment Division v. Smith*, 494 U.S. 872, 886-87 (1990) (majority opinion); *id.* at 906-07 (O'Connor, J., concurring in the judgment); *id.* at 919 (Blackmun, J., joined by Brennan and Marshall, JJ., dissenting). The First Circuit, therefore, erred by invoking this standard and setting itself up as a judge of Roman Catholic teaching on the "centrality" of parochial education, Pet. App. at 18a. It is simply not appropriate for courts to judge the relative "centrality" of religious beliefs. Furthermore, the "substantial burden" test, which Respondent invokes, Opp. at 7, only pertains to challenges to facially neutral restrictions. *See Hartmann v. Stone*, 68 F.3d 973, 979 & n.3 (6th Cir. 1995). Explicit discrimination against religion -- e.g., an express ban on wearing a cross or a pendant with Hebrew lettering, but not on other jewelry -- triggers the highest level of scrutiny regardless of how "substantial" the burden might be or how "central" the practice. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532-33 (1993).

The present case rests at the convergence of these two lines of precedent. Once government extends a *benefit to private entities*, the Constitution does not require, and indeed forbids, the discriminatory denial of that benefit to those who exercise their religious freedom.

In conflict with the First Circuit's decision below, numerous lower courts have held that the Establishment Clause does *not* affirmatively *require* the discriminatory denial of a benefit when used for religious purposes. *See* Pet. § II (citing decisions of supreme courts of Arizona, Ohio, and Wisconsin). Other lower courts, also in conflict with the decision below, have held that the U.S. Constitution affirmatively *prohibits* such discrimination. *E.g., Peter v. Wedl*, 155 F.3d 992, 994-98 (8th Cir. 1998) (denial of paraprofessional to assist disabled student attending private *religious* school, but not other private *nonreligious* schools, was unconstitutional discrimination against religion); *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995) (discriminatory exclusion of private homes from Army's privately-run child care program, on basis of caretaker's religious practices like prayer before meals, was unconstitutional).

This Court should grant review to resolve this conflict and to settle the doctrinal confusion created by the First Circuit's ruling (as well as by the parallel ruling of the Maine Supreme Court, which is the subject of a separate petition for certiorari, No. 99-163).

Respondent insistently portrays the issue as one of "unrestricted, direct subsidies to a pervasively sectarian school for a religious education." Opp. at i; *see id.* at 1, 3, 5, 6, 8-15. But as demonstrated above, this completely mischaracterizes the case. The state has chosen to subsidize the parents' choice of a private school in those districts where there is no public

school. Given that subsidy to parents, the question is whether the state can discriminatorily outlaw parental use of that subsidy at an otherwise eligible private school for the sole reason that the school the parents have chosen is religious.

The First Circuit rested its decision entirely upon the proposition that allowing parents to use the Maine tuition assistance program to attend private *religious* schools would constitute "direct subsidies" to a "sectarian" school. Pet. App. 9a; *see id.* at 5a ("direct payment of tuition"), 10a ("direct . . . aid"), 11a ("broad sponsorship of religious schools"), 14a ("insurmountable impediment to the direct payments or subsidies"). One can interpret this holding in two possible ways, either of which militates in favor of review in this Court.

First, the court below may have believed that it was constitutionally decisive that the grants went to pay for *tuition* and not just for some more specific program like aid for disabled students (as in *Zobrest*) or bus transportation (as in *Everson v. Board of Education*, 330 U.S. 1 (1947)). But this holding undeniably puts the First Circuit in square conflict with the lower court cases upholding tuition voucher and tuition tax credit programs. *See* Pet. § II.

Second, the court below may have believed that it was constitutionally decisive that the *payee* on the tuition grant checks would be the school and not the parents, i.e., that this rendered the aid literally "direct." But this notion would elevate form over substance, and to an absurd degree. It is the *parents* who choose a religious education for their children, not the state. It is thus the *parents* who direct the flow of funds, not the state. Whether the check is made out to the parents and then endorsed over to the school, or made out to the school in the first instance at the direction of the parents, is an irrelevant technicality. To read into the Establishment Clause a "bright

line" based on such a bureaucratic detail would be to undertake precisely the stilted formalism this Court has repudiated, *see Agostini v. Felton*, 521 U.S. 203 (1997).[4]

CONCLUSION

This Court should grant review.

Respectfully submitted,

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[4] Such a rule would also create great constitutional mischief. For example, states could use this rule to nullify the equal access doctrine. By charging a prohibitive fee for the use of its designated fora (such as meeting halls), but then providing the precise fee amount to would-be users in the form of a grant, payable to the user ("direct aid"), the state would concoct a handy device for claiming that it was *required* discriminatorily to exclude religious speakers from the forum.

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